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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICUS CURIAE COMMISSION ON PRESIDENTIAL DEBATES IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE COMMISSION ON PRESIDENTIAL DEBATES IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus the Commission on Presidential Debates ("CPD") is a private non-profit corporation dedicated solely to the sponsorship of general election presidential and vice presidential debates and related voter education functions. CPD has sponsored presidential and vice presidential debates during the 1988, 1992 and 1996 general elections. CPD's debates have been viewed by tens of millions of Americans and have served a valuable voter-education function. As a result of its sponsorship of presidential debates over the last ten years and its ongoing planning and research, CPD is uniquely positioned to

[1] This brief was authored entirely by counsel for *amicus curiae*. No person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

provide the Court with insight into the impediments to meaningful debates presented by the Eighth Circuit's decision in *Forbes v. Arkansas Educational Television Commission*, 93 F.3d 497 (8th Cir. 1996) ("*Forbes*"). CPD therefore submits this brief as amicus curiae to urge the Court to reverse *Forbes*.

CPD traces its origins to two separate studies conducted, respectively, by the Georgetown University Center for Strategic and International Studies and the Harvard University Institute of Politics. Both studies examined the role of debates in presidential elections and urged the creation of an independent organization dedicated to planning and sponsoring such debates. CPD was created in 1987 in response to these two studies. CPD has been granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code. It receives no funding from the government or any political party, and is governed by an independent board of directors.

The development and application of candidate invitation criteria is an ever-present challenge faced by CPD and other debate sponsors. For CPD, this process is driven by the educational goal CPD was formed to further —to foster general election debates, for the benefit of the voting public, between (or among) the leading candidates for the presidency and vice presidency. CPD's process is conducted consistent with several legal requirements, most notably (1) the requirement set forth in 26 U.S.C. § 501(c)(3) that CPD's activities as a private, tax-exempt organization be nonpartisan, and (2) the requirement set forth in 11 C.F.R. § 110.13(c) that debate "staging organizations" make candidate selection decisions pursuant to "pre-established objective criteria."

Thus, CPD has long recognized the need to develop, and has developed, nonpartisan criteria to ensure that it identifies all of the candidates in a particular election year who, regardless of party affiliation and in light of the educational goals of the CPD's debates, properly should

be invited to participate in those debates. The CPD has eschewed a mechanical approach to making this decision as fundamentally unworkable and inconsistent with its goal of fostering, for the benefit of the voting public, general election debates between the leading candidates for the presidency and vice presidency. The *Forbes* decision, while limited to debate sponsorship by state actors, which CPD most decidedly is not, is seemingly premised on the erroneous assumption that all debates can be effectively sponsored through the use of purely mechanical candidate selection criteria. This assumption is erroneous. CPD urges this Court not to render a decision premised on this flawed assumption.[2]

The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

CPD respectfully refers the Court to the briefing of the Petitioner for a comprehensive presentation of the facts and the procedural history of the *Forbes* decision, which CPD will not repeat here.

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[2] Certain minor party candidates for the Office of President of the United States in 1996 have challenged the CPD's candidate selection criteria by maintaining that the FEC's regulations, which call for the application of "pre-established objective criteria," actually proscribe all criteria except those that can be applied purely mechanically. *See* Federal Election Commission Matter Under Review ("FEC MUR") 4451 (Sept. 5, 1996) and 4473 (Sept. 19, 1996). The pending administrative complaints wrongly conflate "objective" with "mechanical," ignore the drafting history of the FEC regulation in question, disregard the practical implications of such a rule, and urge an approach that would raise serious Constitutional issues as applied with respect to the activities of private debate sponsors. Certain of those points are pertinent to the issues presently before the Court and, accordingly, are discussed herein.

ARGUMENT

The court below emphasized its view that First Amendment principles are threatened when a state actor serving as a debate sponsor renders judgments concerning candidates' political viability. *Forbes*, 93 F.3d at 505. However, as noted, underlying the *Forbes* opinion appears to be an assumption of potentially broader application: that a purely mechanical approach to candidate selection, *e.g.*, automatically including all candidates qualified to appear on a particular ballot, is a universally workable and desirable approach to debate sponsorship.

The CPD's experience is to the contrary. In fact, the application of a strictly mechanical approach to candidate selection "ties the hands" of the debate sponsor and runs an unacceptable risk of resulting in crowded and cacophonous debates that may well not include the leading candidates for office. Thus, the Eighth Circuit's rule would inhibit meaningful debates rather than promote them.

First, a strictly mechanical approach of the sort mandated by the Eighth Circuit runs the risk of creating crowded debate stages in which the voices of the leading candidates (*i.e.*, those in whom there is the greatest public interest) are drowned out by a plethora of legally qualified candidates with little or no public support. This problem is inherent in an approach that does not condition debate participation on the demonstration of significant public interest in a campaign.[3] It is one thing to recognize

[3] The Eighth Circuit, undoubtedly believing it was striking a blow for robust debates and inclusiveness, articulated a simple standard. The court ordered the inclusion of all "legally qualified" candidates, which the court equated with appearing on the ballot. However, this approach is both underinclusive (insofar as it ignores write-in candidates), and overinclusive (insofar as it assumes ballot access equates to public interest in a candidate). Ballot access, particularly in House and Senate races, is not necessarily indicative of significant public interest in or support for a particular candidate. *See, e.g.*, Idaho Code § 34-626(a) & (b) (1,000 signatures needed to be on the ballot for Senate; 500 for House); Iowa Code Ann. § 45.1(1) (1,500 signatures needed to be on the ballot for President or Senate).

At the presidential level, examining whether a candidate is "legally qualified" reveals little about the public's level of interest in or support for a campaign. In the three election cycles CPD has sponsored debates, many candidates have been legally qualified (*i.e.*, have appeared on the ballot) in at least one state (in 1988 there were 19; in 1992 there were 23; and in 1996 there were 21). Indeed, even the list of those candidates appearing on the ballot in enough states to win a theoretical Electoral College majority includes candidates with extremely modest public support, including Ronald E. Paul (1988; received .0047 of general election vote), Lenora Fulani (1988 and 1992; received .0024 of 1988 general election vote and .0007 of 1992 general election vote), Andre Marrou (1992; received .0028 of general election vote), Harry Browne (1996; received .005 of general election vote), John Hagelin (1996; received .0012 of general election vote), and Howard Phillips (1996; received .0019 of general election vote).

that a particular debate sponsor, especially during the primary season, may wish to produce a debate that includes all legally qualified candidates, all "declared," candidates, or some other universe of potential debate participants. However, it is quite another to *require* as a matter of law that all such candidates be included, particularly in general election debates. To require the inclusion of multiple candidates with extremely modest levels of public support in such debates seems to place the partisan interests of minor candidates above the public's interest in assessing the candidates who have emerged as the leading contenders for office.

Second, a strictly mechanical approach that requires the extension of debate invitations to all legally qualified candidates runs the risk that the leading candidates will not participate in the debates. Candidates for federal office are not legally required to debate. At all electoral levels, candidates determine whether and under what conditions they will debate. As the District of Columbia Circuit has noted in the context of litigation regarding the extension of invitations to participate in CPD's 1988 general election presidential debates, it is speculative at

best to assume that the leading candidates would agree to share the stage with candidates enjoying only scant public support. See *Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Circuit 1991), *cert. denied*, 502 U.S. 1048 (1992). The Eighth Circuit's rule raises the specter of debates that do not consistently include the leading candidates.[4]

Third, although the *Forbes* decision, as noted, only extends to state actors, it is imperative to note when considering restrictions on debate sponsors' discretion that private sponsors of debates have important First Amendment rights of their own that must be respected. The only governmental interest that is sufficiently compelling to justify restrictions on the expression of participants in the political process is the prevention of corruption or the appearance of corruption. *See, e.g., Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296 (1981) (limits on poliitcal activity are contrary to First Amendment unless they regulate large contributions given to secure a political *quid pro quo*); *Buckley v. Valeo*, 424 U.S. 1, 14, 18 (1976). Thus, in a case arising out of

[4] A sponsor of general election debates, such as CPD, that hopes to provide the electorate with a debate that includes the leading candidates faces a difficult task: to be inclusive enough to invite each of those individuals who genuinely qualify as a leading candidate, but not so inclusive that the candidates in whom the electorate is most interested refuse to participate. It is difficult to conceive of pre-established, purely mechanical criteria that could consistently strike the delicate balance needed to serve this legitimate voter education goal.

It is worth noting that minor party candidates who have urged that CPD and other debate sponsors employ purely mechanical criteria have rejected the use of public opinion polls as the basis for debate participation. Those candidates, presumably anticipating that their level of public support as measured by such polls would not result in their receipt of invitations to debate the leading candidates, have condemned such polls as biased and subjective. CPD has not favored the simplistic use of polling data as the sole basis for debate participation. CPD certainly considers polling data a useful and appropriate indicator of public enthusiasm and concern to be weighed when making candidate selection decisions.

the 1996 presidental debates, the D.C. Circuit expressly noted that "if this court were to enjoin the CPD from . . . choosing debate participants, there would be a substantial argument that the court would itself violate the CPD's First Amendment rights." *Perot v. Federal Election Commission*, 97 F.3d 553, 559 (D.C. Cir. 1996), *cert. denied*, No. 96-1286, 1997 WL 71417 (May 12, 1997), *citing Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, —— U.S. ——, 115 S.Ct. 2338 (1995).

CONCLUSION

For the foregoing reasons, Amicus CPD respectfully urges the Court to reverse the decision of the Eighth Circuit in *Forbes*.

Respectfully submitted,

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